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Before the  
**SURFACE TRANSPORTATION BOARD**

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STB Docket No. AB-1095 (Sub-No. 1)

**PAULSBORO REFINING COMPANY LLC  
– ADVERSE ABANDONMENT –  
SMS RAIL SERVICE, INC. IN GLOUCESTER COUNTY, NJ**

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**REPLY OF PAULSBORO REFINING COMPANY LLC  
TO MOTION FOR PROTECTIVE ORDER**

**ENTERED  
Office of Proceedings**

**APR 5- 2012**

**Part of  
Public Record**

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Dated: April 5, 2012

Attorneys for  
Paulsboro Refining Company LLC

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**REPLY OF PAULSBORO REFINING COMPANY LLC  
TO MOTION FOR PROTECTIVE ORDER**

Paulsboro Refining Company LLC ("PRC") hereby responds to the Motion for Protective Order (the "Motion") filed by SMS Rail Service, Inc. ("SMS") on April 2, 2012. While PRC does not object to the entry of a protective order, PRC believes that certain of the provisions should be modified prior to its adoption by the Board.

**Requested Modifications**

As noted in the Motion, the proposed protective order is modeled after a protective order that the Board has issued in a rate proceeding. In reviewing protective orders in recent abandonment proceedings,<sup>1</sup> PRC believes that the following modifications should be made to the proposed form of Protective Order which was attached to the Motion:

(A) It should be clarified that the provisions of sections 1(a), (c) and (d) apply to both CONFIDENTIAL and HIGHLY CONFIDENTIAL material.

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<sup>1</sup> PRC reviewed the Protective Orders issued in *Palmer Ranch Holdings, Ltd., et al – Adverse Abandonment – Seminole Gulf Railway, LP*, STB Docket AB-400 (Sub-No. 5), served January 9, 2012 ("Palmer Ranch"); *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, STB Docket AB-1071, served June 29, 2011 ("Stewartstown"); and *Montreal, Maine & Atlantic, LTD – Discontinuance of Service and Abandonment – In Aroostook and Penobscot Counties, ME*, STB Docket No. AB-1043 (Sub-No. 1), served March 4, 2010 ("MMA").

(B) It should be clarified that a party can challenge the designation of CONFIDENTIAL material, as well as the designation of HIGHLY CONFIDENTIAL material. See the second sentence of section 2.

(C) Section 7 does not seem appropriate for an abandonment proceeding, particularly to the extent that it suggests that transportation contracts relating to locations other than the Paulsboro refinery might be relevant or have to be produced. PRC suggests the following replacement language:

To the extent that documents reflecting CONFIDENTIAL or HIGHLY CONFIDENTIAL material are produced by a party in this proceeding, and are held and/or used by the receiving person in compliance with the requirements of this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

See *Palmer Ranch*, Protective Order §14; *Stewartstown*, Protective Order §13; *MMA*, Protective Order §14.

(D) Section 10 should be modified to ensure that PRC (and not just its outside counsel or consultants) should be able to review information produced by SMS that relates to services (including without limitation common carrier, switching, maintenance) provided by SMS for PRC at Paulsboro under their Rail Line Service Agreement, as amended, even if such information might be HIGHLY CONFIDENTIAL as to other parties, participants or the general public. This should apply regardless of whether PRC originally generated any of the data or information. In addition to being crucial for PRC to be able to analyze any arguments SMS might make in this proceeding, SMS has already contractually agreed in the Rail Service Agreement to allow PRC to audit SMS's records that would reflect such information.

Accordingly, PRC requests that the first sentence of Section 10 be modified to provide as follows:

Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), as well as data, information and documentation of another party related to the services provided by SMS to PRC at or related to the Paulsboro facility, even if that data, information, and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party.

(E) PRC believes any party should have the right to reveal its own data or information, and requests the addition of the following provision:

Nothing in this Protective Order restricts the right of any party to disclose voluntarily any CONFIDENTIAL or HIGHLY CONFIDENTIAL material originated by that party, if such material does not contain or reflect any CONFIDENTIAL or HIGHLY CONFIDENTIAL material originated by any other party.

*See Palmer Ranch*, Protective Order §16; *Stewartstown*, Protective Order §15; *MMA*, Protective Order §16.

A proposed revised form of Protective Order is attached as an Appendix hereto.

**Conclusion**

For the foregoing reasons, PRC requests that the Board issue a protective order that reflects the modifications requested herein.

Respectfully submitted,



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Dated: April 5, 2012

Attorneys for  
Paulsboro Refining Company LLC

## APPENDIX

### PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as "material") in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

- (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
- (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for the party providing the CONFIDENTIAL material.
- (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 11.
- (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 C.F.R. § 1104.14.
- (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." ~~If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.~~ Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective

Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for the party providing the HIGHLY CONFIDENTIAL material. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d) and (e).

3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as

"CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that: (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Paragraph 8 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §11904. To the extent that documents reflecting CONFIDENTIAL or HIGHLY CONFIDENTIAL material are produced by a party in this proceeding, and are held and/or used by the receiving person in compliance with the requirements of this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. §11904 or of any other relevant provision of the ICC Termination Act of 1995.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), as well as data, information and documentation of another party related to the services provided by SMS to PRC at or related to the Paulsboro facility, even if that data, information, and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from

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the producing party. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing "HIGHLY CONFIDENTIAL" material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the "HIGHLY CONFIDENTIAL" information of the filing party contained in the pleading that must be redacted from the "HIGHLY CONFIDENTIAL" version prior to review by the in-house personnel of the reviewing party.

11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any CONFIDENTIAL or HIGHLY CONFIDENTIAL material originated by that party, if such material does do not contain or reflect any CONFIDENTIAL or HIGHLY CONFIDENTIAL material originated by any other party.

12+. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in this proceeding should simultaneously file a public version of the pleading.

**UNDERTAKING  
CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on April \_\_\_\_\_, 2012 governing the production of confidential documents in STB Docket No. AB-1095 (Sub-No. 1), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. AB-1095 (Sub-No.1) or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
Dated: \_\_\_\_\_

**UNDERTAKING  
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for \_\_\_\_\_, for which I am acting in this proceeding, I, \_\_\_\_\_, have read the Protective Order served on April \_\_\_\_\_, 2012 governing the production of confidential documents in STB Docket No. AB-No. 1095 (Sub-No.1), understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL" that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counselor outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counselor outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing "HIGHLY CONFIDENTIAL" information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL] [CONSULTANT] TO

\_\_\_\_\_  
[Party Name]

Dated: \_\_\_\_\_

## CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following persons by electronic delivery or by U.S. first class mail, postage prepaid, as indicated:

*via electronic delivery:*

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\_\_\_\_\_  
Eric M. Hocky

Dated: April 5, 2012